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**IN THE
COURT OF APPEALS OF INDIANA**

RANDALL G. AMSTUTZ and KARYL J.
AMSTUTZ,

Appellants-Plaintiffs,

vs.

DORIS M. EVERTTS and JOYCE EVERTTS
MUZZY, now FLEMING,

Appellees-Defendants.

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No. 44A04-0504-CV-190

APPEAL FROM THE LAGRANGE CIRCUIT COURT
The Honorable J. Scott Vanderbeck, Judge
Cause No. 44C01-0408-PL-15

October 4, 2006

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Doris M. Evertts has filed her Petition for Rehearing based upon our reversal of the trial court's determination awarding Evertts a prescriptive easement in property owned by the Amstutzes. The Memorandum Decision determined that the trial court's judgment was clearly erroneous inasmuch as the trial court incorrectly placed the burden of proof upon the Amstutzes to defeat Evertts's claim for a prescriptive easement. Additionally, the undisputed evidence failed to prove the existence of a prescriptive easement. The Memorandum Decision also remanded the matter for further proceedings consistent with the decision.

Although we deny rehearing, we write to clarify our decision to remand. The final paragraph of this Court's decision stated:

The parties did not brief on appeal the quiet title, vacation, slander of title, damages, and attorney's fees components of the Amstutzes' claims. Therefore, the matter is reversed and remanded for further proceedings consistent with this opinion.

Slip op. at 9.

Evertts contends on rehearing that the decision is incorrect because it remands for the trial court to consider matters that were "waived" prior to trial pursuant to a pretrial order (the Pretrial Order). Our review of the trial transcript, the appendices, the exhibits, the parties' original briefs on appeal, and the Pretrial Order indicate that our decision to remand was appropriate.

The transcript begins with a discussion among counsel and the trial court as to whether Evertts's answers and counterclaims directed to the Amstutzes' Second Amended Complaint should be deemed as admissions against the Amstutzes because

they failed to make a separate answer to Evertts's counterclaims. The Amstutzes' counsel urged that the matters had been answered in the past and the same answers applied. The trial court took under advisement the ruling on whether the failure to answer Evertts's assertion of her counterclaim issues would constitute admissions in favor of Evertts due to the Amstutzes' failure to answer each time. Therefore, the trial commenced on the issues set out in the Amstutzes' Second Amended Complaint and Evertts's answers and counterclaims. Those included the components set out for remand.

The Pretrial Order, signed by the trial court and the parties, was entered a few weeks prior to trial. It sets out contentions and issues that included all five of the components we noted. The Pretrial Order is a lengthy document that does not appear to narrow the issues in any significant manner. It specifically sets out that Evertts is requesting attorney's fees, that the Amstutzes brought in all parties necessary to determine the quiet title, slander of title, and vacation issues because Evertts and her granddaughter filed Affidavits of Prescriptive Easement and recorded the documents without giving notice to the Amstutzes, and that the Amstutzes were requesting damages.

The trial court's Findings of Fact and Judgment (the Judgment) refers to the Pretrial Order as defining the issues, but it does not set out the issues. As noted above, the Judgment goes on to place the burden on the wrong party, inasmuch as it requires the Amstutzes to disprove that Evertts had a prescriptive easement. Most important to the question whether remand is appropriate, the final paragraph of the Judgment requires Evertts to:

retain the services of a surveyor to prepare a legal description for that real estate over which she holds a prescriptive easement, as referenced in paragraph 3 of this judgment; said description shall be recorded together with a copy of this judgment and shall be indexed under the names of both Plaintiffs and Defendant Doris M. Evertts.

Judgment accordingly. Costs to Plaintiffs. Costs paid.

Appellant's Appendix at 11. The Chronological Case Summary supplied to this Court does not indicate whether Evertts subsequently recorded the prescriptive easement. Further, the Judgment plainly states that the Amstutzes paid the costs of the action.

Based upon the record before us, this matter is not amenable to simple reversal without also remanding to “clean up” the issues that appear to conflict with our reversal of the trial court’s ruling. Those matters include, but are not limited to:

- 1) the two Affidavits of Prescriptive Easement recorded by Evertts and her granddaughter that would serve as a potential cloud on the Amstutzes’ title,
- 2) any prescriptive easement recorded by Evertts, or others on her behalf, based upon the trial court’s judgment,
- 3) any question of costs paid by the Amstutzes after the trial court’s judgment in favor of Evertts inasmuch as that judgment has been reversed, and any question of attorney’s fees that remain,
- 4) any questions as to whether Evertts or her successors have vacated the disputed strip of property over which they have asserted the prescriptive easement, and
- 5) whether the Amstutzes are entitled to damages.

Therefore, Evertts’s petition for rehearing is denied.

MAY, J., and CRONE, J., concur.